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DANIEL G. MARSHALL,

Petitioner,

vs.

THE STATE BAR OF CALIFORNIA, a Public Corporation,

Respondent.

PETITIONER'S REPLY BRIEF.

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IN THE

Supreme Court of the United States

October Term, 1948.

No. 586

DANIEL G. MARSHALL,

Petitioner,

vs.

THE STATE BAR OF CALIFORNIA, a Public Corporation,

Respondent.

PETITIONER'S REPLY BRIEF.

Statement.

Respondent does not dispute any facts shown in the petition. The cause is now joined on the merits of the constitutional issues.

I.

That the Petition Does Not Show Petitioner Is a Negro Does Not Defeat His Right to Review Here.

Without any support in the record, respondent asserts that petitioner is not a Negro. The record is silent concerning the racial derivation of petitioner. That derivation is immaterial. It may be that petitioner has no genealogical information sufficient to enable him to state under oath that he is or is not a Negro, racial classification being judicially largely a matter of geography and

the nearly impossible application of an involved arithmetical formula[1]

But if he is not a Negro, the record shows he is and was a member of the State Bar at all times mentioned in his petition for mandamus[2] by admission of respondent. The due he has paid[3] under compulsion of statute[4] have gone into respondent's treasury,[5] which has been drawn upon to pay the expenses of the operation of the Conference of State Bar Delegates,[6] whose secretary is the secretary employed by respondent.[7]

The test here is the color of petitioner's dues-money, not of the hand with which he delivers it to respondent. Be he white, brown, black, red or yellow, or any one of the hues of the rainbow or spectrum, he has a justiciable right, regardless of his melanin content to insist that the key of respondent's cash box be turned in the lock against expenditures for such unlawful purposes as, say, financing an organization acting to overthrow the government by force and violence (the Smith Act, 18 U. S. C. 2385);

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[1]*Who Is Legally a Negro?* Vol. III, No. 2 Intramural Law Review of New York University, School of Law, page 91 (April, 1948).

[2]R. 1, Petition for Writ of Mandamus, paragraph 1.

[3]R. 4, said Petition, paragraph 16.

[4]State Bar Act, Sections 6140, 6143.

[5]State Bar Act, Sections 6028, 6144.

[6]R. 4, said Petition, paragraph 16.

[7]R. 12, said Petition, Exhibit "A," Article VI, Section 11(c): State Bar Act, Section 6022.

to establish a state religion (First Amendment, United States Constitution) or, as here, to aid and abet the operation of a state agency by a discriminatory racial practice contrary to the public policy of the State of California and the United States.[8]

Negro or not, petitioner has the right to insist that not one mill of his dues be used to subvert the constitution in the operation of this state agency, the same constitution he swore to uphold when he was admitted to the bar.[9] This cavil of respondent pollutes the clean stream of constitutional life. Must the Gentile taxpayer stand by on the courthouse steps while the state surgeon, using a tax-bought scalpel, emasculates the Jewish citizen? The Jew may not want to establish his elegibility for that scalpel by making the sortie into the forum where he ought to but might not succeed if he mistakes his remedy or prints his petition in type not authorized by the rule. Is the white taxpayer to be told his petition to enjoin the expenditure of municipal funds to purchase a rope to lynch a Negro is futile since, forsooth, his neck is not intended for the noose?

Is it only the victim of a discriminatory racial practice violative of the public policy of the state and of the United States who can speak in a tone loud enough to catch the judicial ear? Moreover, a discriminatory law is, equally

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[8]*James v. Marinship Corp.*, 25 Cal. 2d 721.

[9]State Bar Act, Section 6067.

with other laws offensive to the constitution, no law at all. To hold fast to the rule urged by respondent in a case like this one where grave questions of constitutionality must necessarily be determined in a real, earnest and vital controversy between litigants is to exceed the limits fixed by the reasons for the rule, which must yield to a policy paramount to the reason itself. Here the need of striking down a discriminatory practice contrary to the public policy of state and nation is paramount to the reason petitioner advances for invocation of the rule.[10] Here, as in certain decisions of this Court, the case falls within the class in which, if the unconstitutionality of the act is shown, equitable relief may be had.[11]

The injury sustained by the petitioner in this situation is neither indirect nor remote. The right to vote at the Conference of State Bar Delegates is a special form of the voting franchise around which this Court threw the cloak of constitutional protection in *Smith v. Allwright*, 321 U. S. 649. Whatever else the respondent state agency does with it, it cannot limit that franchise by unconstitutional means. To allow delegates of the Los Angeles Bar Association to vote at the conference is to dilute the effect of voter's constitutional presence, such dilution being the effect of the exercise of the voting franchise by an illegally constituted delegation. Such dilution of the constitutional

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[10]5 Cal. Jur. 625, Section 54.

[11]*Truax v. Raich*, 239 U. S. 33, 38, 39; *Buchanan v. Warley*, 245 U. S. 60.

vote in a *pro tanto* denial of the franchise. Consequently, the presence of an illegally constituted delegation is a direct injury to delegates, such as petitioner, who are constitutionally present.

Four decisions of this Court are cited by respondent in support of its claim of lack of capacity of petitioner to raise the constitutional considerations.[12]

Three of them show that no question was raised with respect to the deprivation of property in contravention of the Fourteenth Amendment.[13] That question is raised here and for that reason alone they have no significance in the case at bar. That the property right of petitioner is small is shown by the analogy of another of these four cases to be unimportant.[14] The same case does not deal with the point for which respondent names it but lays down two rules with which, if it is at all applicable, petitioner complies, namely: (1) The judicial power does not extend to the determination of abstract questions; (2) claims based merely upon assumed potential invasions of rights are not enough to warrant judicial intervention. Here a real and not an abstract right is to be determined and here there is an actual, not an assumed invasion of rights.

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[12]Respondent's Brief, pages 2, 3.

[13]*Tileston v. Ullman*, 318 U. S. 44; *Columbus & G. R. Co. v. Miller*, 283 U. S. 96; *Liberty Warehouse Co. v. Burley, etc. Ass'n* 276 U. S. 71.

[14]*Ashwander v. T.V.A.*, 297 U. S. 288.

II.

There Is No State Ground of the Decision Here Sought to Be Reviewed.

Respondent makes no answer to the argument of petitioner's brief that the statutory relationship of respondent and the Supreme Court of California is such as to make that tribunal the only State court with jurisdiction to curb, by prerogative writ, the unconstitutional discriminatory racial practice shown by this record to be present in the internal operation of respondent, an integrated bar.

The constitutional, traditional and statutory control of the bench over the bar amply supports such legislative distribution of jurisdiction of prerogative writs.

This being so, the California decisions cited by respondent[15] do not show that the action of the Supreme Court of that state, in this case, was upon the non-Federal ground of discretionary refusal of jurisdiction since they deal with prerogative writs upon subjects where the Supreme Court does not have exclusive and final jurisdiction. One of them[16] shows precisely the situation which petitioner claims is here present. In the cited case the court pointed out, citing a decision of this Court,[17] where the litigation originated in the California Supreme Court, that the denial by that court, without written opinion, as was the case here, of an application for writ of review of an order of the Railroad Commission constituted a final adjudication of the correctness and the validity of the decision which

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[15]Respondent's Brief, pages 4-6.

[16]*Funeral Dir. Assn. v. Board of Funeral Dirs.*, 22 Cal. 2d 104, 107.

[17]*Napa Valley Co. v. Railroad Commission*, 251 U. S. 366.

it was attempted to have reviewed. That result was reached because, as in the case at bar, the Supreme Court of California had *exclusive* juridiction.[18]

III.

If There Is a State Ground of the Decision Here Sought to Be Reviewed, It Is so Unsubstantial as to Require the Assumption by This Court That It Is Based on a Federal Question Wrongly Decided.

Under this view this is a case like *Williams v. Kaiser,* 323 U. S. 471, and here, like there, the state ground of the decision, if there is one, is neither substantial nor sufficient and this Honorable Court must assume that the denial of the writ was based on the Federal question which entitles the petitioner here to review.

The importance of the constitutional issues here raised, dealing as they do with the internal professional composition of an arm of the court, must overpower a pretended or purported exercise of discretion under a state court rule. The issue here has gravity like that in *Perez v. Lippold,* 32 A. C. (Advance Sheets, California Supreme Court 757, decided October 1, 1948), where the California Supreme Court took original jurisdiction in another mandamus case. That court has recently indulged its discretion in a very large number of original prerogative writ cases dealing with property rights, such as *City of Whittier v. Dixon,* 24 Cal. 2d 664, 668; *City and County of San Francisco v. Boyd,* 22 Cal. 2d 685, 707; *City and County of San Francisco v. Linares,* 16 Cal. 2d 441, 448. The human rights here involved indubitably were at least as well entitled to the speedy attention of the state court of last resort.

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[18]*Funeral Dir. Assn. v. Board of Funeral Dirs.,* 22 Cal. 2d 104, 107.

Conclusion.

Respondent defends its entire position on the two points already answered and it is safe to say that they are its only points, notwithstanding its claim that because of their strength "respondent will not burden this Court with a consideration of the many other points raised in petitioner's brief herein."

The gravity and urgency of the case at bar, it is respectfully represented, are such that the issues ought to be decided here, a Federal question existing which was presented and fruitlessly urged below. Dealing as it does with a fundamental human right, related to the profession which has a peculiar and tremendous obligation of loyalty to and implementation of the United States Constitution, there can be no legal concept paramount to the relief here sought. But if the obscurantism injected by the failure of the court below to file a written opinion has been effective to conceal for the moment the Federal question here present, then this Court ought nevertheless to grant certiorari and remand the cause to the Supreme Court of the State of California to give that court a final opportunity to pass correctly upon the constitutional issues here involved. Any course less than that will only delay a final disposition of the issues which have the qualities of importance and urgency.

Respectfully submitted,

DANIEL G. MARSHALL,
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